



**NEW ZEALAND
HEALTH PRACTITIONERS
DISCIPLINARY TRIBUNAL**

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HPDT **1093/Phar19/464P**

UNDER The Health Practitioners Competence Assurance Act 2003 (“the HPCA Act”)

IN THE MATTER of a disciplinary charge laid against a health practitioner under Part 4 of the Act.

BETWEEN **A PROFESSIONAL CONDUCT COMMITTEE** appointed by the **PHARMACY COUNCIL OF NEW ZEALAND**

Applicant

AND **SIMON JAMES BLUE**, registered pharmacist, of Christchurch

Practitioner

HEARING held by video conference link on 29 April 2020

TRIBUNAL: Mr D M Carden (Chair)
Ms K Shaw, Ms M-A O’Rourke, Ms J Dawson and Mr C Nichol (Members)
Ms K Davies (Executive Officer)

APPEARANCES Ms C Deans for the Professional Conduct Committee
Mr S J Blue in person

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Introduction

- [1] Mr Simon James Blue, a registered pharmacist, registered in June 2010 and having worked in Australia for a number of years from 2013, took temporary employment in the role of a pharmacy technician at a pharmacy in Dunedin for 5 days between 3 and 7 October 2016. During that time Mr Blue completed tasks that fell within the registered pharmacist scope of practice, including handling, preparing and dispensing medicines. During that time Mr Blue did not have an Annual Practising Certificate (APC).
- [2] On 30 January 2017 Mr Blue was convicted in the Christchurch District Court of the offence of stealing a class B Controlled Drug, namely Rubifen, an offence under the Misuse of Drugs Act 1975 carrying a maximum penalty of 7 years imprisonment.
- [3] An investigation was carried out by a Professional Conduct Committee (PCC) of the Pharmacy Council of New Zealand (the PCNZ) which has laid a Charge before the Tribunal under the Health Practitioners Competence Assurance Act 2003 (the HPCA Act).

The Charge and hearing

- [4] The Charge in full is transcribed in the Schedule to this decision.
- [5] The first particular of the Charge referred to the conviction and alleged that it reflected adversely on Mr Blue's fitness to practise, relying on section 100(1)(c) of the HPCA Act. The second particular alleged that Mr Blue had practised his profession during the five days in question while not holding a current Practising Certificate, relying on section 100(1)(d) of the HPCA Act.
- [6] Because of the Covid-19 lockdown period the hearing was conducted by Audio-video conference link with the PCC represented by counsel and Mr Blue representing himself.
- [7] Prior to the hearing the following documents were filed and exchanged: an Agreed Summary of Facts signed by both parties; written Submissions from the PCC on Liability and Penalty, Costs and Non-publication of name; the PCC estimate of costs; Mr Blue's Response to the Submissions on Penalty and costs with an application for Non-publication of name; a statement by Mr Blue as to his financial position; an estimate of the resourcing costs for the Tribunal for the hearing; Reply Submissions from the PCC on the question of costs; and an

Agreed Bundle of Documents which was admitted on the basis that had been canvassed at an earlier conference namely that each document in the bundle:

- i) Is what it purports to be on its face.
- ii) Was signed by any purported signatory shown on its face.
- iii) Was sent by any purported author to, and was received by, any purported addressee on its face.
- iv) Was produced from the custody of the party indicated in the index.
- v) Is admissible evidence. and
- vi) Is received into evidence as soon as referred to by a witness in evidence, or by counsel in submissions, but not otherwise.

[8] Although those documents contained reference to matters pertaining to penalty, those aspects were disregarded by the Tribunal in considering whether the Charge and its two particulars were made out.

Background

[9] Mr Blue was first registered as a pharmacist with the PCNZ in the intern scope of practice on 1 February 2009 and in the pharmacist scope of practice on 9 June 2010. Mr Blue held appropriate APCs between February 2009 and March 2013 but did not apply for an APC entitling him to practise pharmacy in New Zealand after that date.

[10] In early 2013 Mr Blue moved to Sydney, Australia and was first registered with the Pharmacy Board of Australia on 21 February 2013 by way of mutual recognition under the Trans - Tasman Mutual Recognition Act 1997. He worked as a pharmacist there at the Lawler's Pharmacy, Dee Why, New South Wales.

[11] Between 15 March 2016 and 24 November 2016 Mr Blue was investigated by the Health Care Complaints Commission for alleged theft of Ritalin tablets from that pharmacy. Mr Blue's registration with the Pharmacy Board of Australia was suspended for the period from 6 April 2016 to 20 October 2016; and from 21 October 2016 a condition was imposed on his registration that he must not practise as a pharmacist.

[12] After notification from the New South Wales Ministry of Health in May 2016, the PCNZ wrote to Mr Blue on 17 May 2016 advising him that it had been

notified that Mr Blue was being investigated for theft of Ritalin from his former employer and the letter included:

“As you do not currently hold an Annual Practising Certificate, please note that you are not legally entitled to practise pharmacy in New Zealand, that is, complete any of the tasks listed in the pharmacist scope of practice, even if this was under the supervision of another practising pharmacist...”

- [13] On 10 November 2016 the Australian Health Practitioner Regulation Agency received a request from Mr Blue to surrender his registration and his name was removed from the register. On 24 November 2016 that Agency was notified that the outcome of the investigation was that Mr Blue had misappropriated 6900 Ritalin tablets from his former employer for his personal use over a two year period but no steps were taken because Mr Blue had surrendered his registration and had indicated an intention to commence study in a different field.
- [14] Prior to Mr Blue’s request to surrender his registration he had moved to New Zealand. He was employed at Forbury Pharmacy in Caversham, Dunedin, in a temporary role as a technician for the period of 5 days between Monday 3 October 2016 and Friday 7 October 2016 to cover the owner and operator while she was on leave. In the Agreed Statement of Facts the parties agreed that Mr Blue was not to work in any other capacity than a technician because he did not have an APC; and he did not have an employment contract because the position was not permanent.
- [15] Mr Blue did not disclose to the owner and operator of the pharmacy that he had been under investigation in Australia for misappropriation of Ritalin from his former employer; and he did not disclose the contents of the letter of 17 May 2016 from the Registrar of the PCNZ.
- [16] In the Agreed Statement of Facts the parties agreed that while employed by Forbury Pharmacy, Mr Blue completed tasks that fell within the registered pharmacist scope of practice, including, but not limited to, handling, preparing and dispensing medicines. That is the basis for the allegation in particular B of the Charge.
- [17] The Agreed Summary of Facts further records that at approximately 4:21 pm on Thursday 6 October 2016 Mr Blue went to the Controlled Drug safe at the back

room of Forbury Pharmacy to put some medication in the safe. Having done so he took out a packet of Rubifen and placed this into his trouser pocket. He then left the room briefly before returning and put the Rubifen into his jacket pocket which was hanging up in the same room. At the end of his shift at Forbury Pharmacy that day, he took his jacket with the Rubifen in the pocket and went home. The packet of Rubifen contained 30 x 10 mg tablets. Under the Misuse of Drugs Act 1975 Rubifen (methylphenidate) is listed as a Class B Controlled Drug.

- [18] On 13 October 2016 Mr Blue gave a statement to the Police in which he admitted that he took the Rubifen for his own personal use and that he needed help for his addiction to that drug.
- [19] A charge was laid against Mr Blue in the Christchurch District Court under section 11(1)(a) of the Misuse of Drugs Act 1975 that Mr Blue stole the class B Controlled Drug Rubifen and on 30 January 2017 Mr Blue entered a guilty plea and was convicted, his application for discharge without conviction having been declined.
- [20] On 30 January 2017 he was sentenced to 150 hours community work. The parties have agreed that this was Mr Blue's first conviction.
- [21] In the Agreed Summary of Facts Mr Blue has admitted the conviction and that it reflects adversely on his fitness to practise as a pharmacist and further admitted that between 3 and 7 October 2016 he practised the profession of pharmacy without a current APC.

The Charge

- [22] The submissions for the PCC canvassed the two particulars of the Charge and the respective elements required to be established. Those submissions referred to analogous cases¹ and the principles involved. It was submitted that each particular was established on the facts and according to principles and that each particular could be found made out in accordance with section 100(1)(c) and (d) respectively.

¹ *Dr Sathe* 568/Den13/246P; *Mr S* 886/HP16/377P; *Rich* 94/Nur07/51P; *Ainsworth* 295/09/143P; *Z v Dental Complaints Assessment Committee* [2008] NZSC 55; *White* 366/Opt/10/168P; *Henderson* 477/10/210P and 213P; *Ms H* Psy256/09/128P; *Bhatia* 344/Med10/151P; *Heath* 854/Phar16/356; *Dr Kewene* 503/Den/12/219P.

[23] For his part Mr Blue accepted that he had agreed to the Agreed Summary of Facts which contained his acceptance that the Charge is made out in respect of each particular. He did refer, in the context of particular B (practising without a current APC) to his role at the Forbury pharmacy as a pharmacist technician and said that he was not aware that his not having an APC prevented him from working as a pharmacist technician; and referred to there having been no objection to his working there in that situation from his employer.

Particular A – Conviction reflecting adversely on fitness to practise

[24] To establish particular A of the Charge it was needed to be proven:

- a) That there was a conviction of Mr Blue for an offence which qualified for consideration under section 100(2) of the HPCA Act. That conviction was accepted by Mr Blue and the documents in the bundle confirmed that. That conviction did qualify because subsection 2(a)(xi) refers expressly to a conviction under the Misuse of Drugs Act 1975 and furthermore subsection (b) refers to a conviction for an offence punishable by imprisonment for a term of three months or longer. In this case the offence for which Mr Blue was convicted carried a maximum imprisonment term of 7 years.
- b) That the conviction reflected adversely on Mr Blue's fitness to practise as a pharmacist.

[25] The Tribunal accepts the PCC submissions:

- a) That the conviction involves serious dishonesty offending with theft of Controlled Drugs attracting a penalty of imprisonment for up to 7 years.
- b) That pharmacists hold a position of trust within the community and are trusted with the management, handling and dispensing of controlled substances, a trust which Mr Blue breached by using his position to access a controlled substance for his own purposes.
- c) That Mr Blue's offending was directly related to the pharmacy profession; with Mr Blue having a responsibility, as a registered pharmacist, to ensure the secure storage and proper dispensing of Controlled Drugs, which Mr Blue has breached by stealing the Controlled Drugs for his own use and contrary to his professional responsibilities.

- d) That there were victims of Mr Blue's offending namely the Pharmacy in question and its owner, who had provided Mr Blue with employment in good faith and to whom Mr Blue did not disclose that he had been under investigation in Australia for misappropriation of Ritalin from his former employer.
- e) That Mr Blue had behaved unethically and was clearly in breach of Principles of 6.2 and 6.5 of the Code of Ethics for his profession promulgated by the PCNZ under its obligations under section 118 of the HPCA Act, which read:

“6.2 Attain and maintain the highest possible degree of ethical conduct and accept responsibility and accountability for membership in the profession. Avoid any conduct that might bring the profession into disrepute or impair the public's confidence in the pharmacy profession.

...

6.5 Ensure you do not abuse your professional position or exploit the vulnerability or lack of knowledge of others”.

- f) That Mr Blue's conduct does not reflect the high standards expected of him as a pharmacist and the theft of Rubifen from his employer displayed a serious lack of professional and moral judgment on his part.

[26] The Tribunal finds that the facts are made out such that it is satisfied that the grounds in section 100(1)(c) of the HPCA Act are made out, namely that Mr Blue was convicted of an offence (qualifying under subsection (2)) that reflected adversely on his fitness to practise.

Particular B – Practising without an APC

[27] As to particular B of the Charge there are three elements needed to be proven, namely:

- a) That Mr Blue was a registered pharmacist.
- b) That Mr Blue practised as a pharmacist.
- c) That Mr Blue did not hold a current APC.

[28] The Agreed Summary of Facts records that Mr Blue was at the time a registered pharmacist and documents in the bundle affirmed this.

[29] The Agreed Summary of Facts also confirmed that Mr Blue practised the profession of pharmacy. It expressly said that, while employed by Forbury

Pharmacy, Mr Blue completed tasks that fell within the registered pharmacist scope of practice, including, but not limited to, handling, preparing and dispensing medicines.

- [30] The Agreed Summary of Facts also recorded what is established by documents in the bundle namely that the scope of practice for registered pharmacists in New Zealand is:

“ ... necessarily broad and is wider than pharmacists working directly with patients, given that such roles influence clinical practice and public safety.

....

The practice of pharmacy may include, but is not limited to:

...

- *The custody, preparation and dispensing of medicines and pharmaceutical products;*

...

- *Administration of medicines, including injectable medicines”.*

- [31] Mr Blue had had from the PCNZ, after his return from Australia, the letter dated 17 May 2016 which included reference to the allegations of misappropriation of Ritalin tablets by Mr Blue as an employee pharmacist at the pharmacy at Dee Why, Australia and the following paragraphs:

“3. As you do not currently hold an Annual Practising Certificate, please note that you are not legally entitled to practise pharmacy in New Zealand, that is, complete any of the tasks listed in the pharmacist scope of practice, even if this was under the supervision of another practising pharmacist. See <http://www.pharmacycouncil.org.nz/> scope practice for further details.

“4. If you are planning to practise, the Council will consider your application for a practising certificate in light of the information provided by the Ministry of Health, NSW. Prior to making any decision in relation to this application, the Council will provide you with a copy of any information that is relied on to reach a decision, and an opportunity to make submissions and be heard.”

- [32] He had the obligation to comply with the law so far as it required that he have an APC for the work that he was employed to do at the Forbury Pharmacy. Ignorance of the law is no excuse for Mr Blue. The letter from the PCNZ referred to should have made it abundantly clear to him that he was not to work even under the supervision of another practising pharmacist on any duties as listed in the scope of practice. There may have been some responsibility on the

part of Mr Blue's prospective employer at the Forbury Pharmacy to have inquired into the matter of his having the appropriate APC for the work that was expected of him but that is not for the Tribunal to say. It goes to the question of mitigation in penalty.

- [33] The Tribunal finds as a matter of fact that Mr Blue did practise as a pharmacist in the scope of pharmacy during the period 3 October 2016 to 7 October 2016. The Tribunal further finds that during that period he did not have a current APC. That is admitted to by him in the Agreed Summary of Facts and is established by other documents in the bundle. He has not in fact applied for, or held, an APC entitling him to practise pharmacy in New Zealand since 31 March 2013.
- [34] Accordingly, the Tribunal finds the three elements required to be established for this particular of the Charge and finds it to be made out.

Penalty

- [35] The PCC, having referred to various principles involved, submitted that it was appropriate there should be an order for censure. It submitted that it was open to the Tribunal to consider an order for cancellation of Mr Blue's registration or for suspension of him.
- [36] With respect to his having practised without an APC, it was submitted:
- a) That an APC is an important aspect of meeting the principal purpose of the HPCA Act which is to protect the health and safety of the public, being a notice to the world that a practitioner is fit and competent to practise;
 - b) That a registered practitioner's failure to comply with the requirement to hold a current APC undermines a fundamental principle on which the regulatory regime operates;
 - c) That registration brings with it privileges and responsibilities with the onus on each individual practitioner to comply with the requirements imposed by the regulatory regime;
 - d) That Mr Blue knew, or ought to have known, of the legal requirement to obtain an APC in order lawfully to practise pharmacy; and
 - e) That the Tribunal has accepted previously in other cases that even inadvertent or unintentional lapses are deserving of the imposition of penalties.

[37] Aggravating factors were mentioned:

- a) The most serious of which was that Mr Blue had been convicted for theft of Rubifen against a background of having been investigated for having misappropriated large quantities (6900 tablets) of the same drug from his employer in Australia. Mr Blue had dispensed there large amounts of the drug to a patient in accordance with prescriptions that the doctor named denied having ever issued and Mr Blue could not account for this discrepancy. Mr Blue surrendered his registration and indicated an intention to commence study in a different field and no further steps were taken against him in Australia.
- b) That Mr Blue displayed no insight or remorse despite the Australian investigation and findings, but instead carried on stealing Rubifen from his new employer in New Zealand.
- c) That his pattern of behaviour in Australia suggested that, had he not been caught in New Zealand, he may well have taken further opportunities to steal the drug in New Zealand. The Tribunal accepts those submissions which are based on the documents contained in the agreed bundle and accepts that there was the potential for further offending on Mr Blue's part.
- d) That Mr Blue had only been employed at Forbury Pharmacy for four days before he stole the Rubifen.
- e) That Mr Blue initially denied taking the Rubifen when asked about the missing medication and only admitted to the theft after having been presented with CCTV footage of his having taken the drug.
- f) That Mr Blue did not disclose to his employer that he had been under investigation for theft of Ritalin in Australia which the District Court described as "*very serious deception indeed*", continuing with saying that:

"had [Mr Blue's employer] known of Mr Blue's difficulties in Australia ... he would not have obtained that position even for a week and, more importantly, he would not have had unsupervised access to the drug safe."

- g) That the drug that Mr Blue stole was a Controlled Drug and therefore, had the potential for abuse especially in the community in an uncontrolled manner.
- h) That a conviction for theft of a Controlled Drug amounts to serious dishonesty offending.
- i) That the offending occurred against the background of Mr Blue's practising without an APC; he having known that the PCNZ had information about the Australian investigation as mentioned in the letter from the Registrar dated 17 May 2016. Had Mr Blue applied for an APC, the PCNZ may have imposed restrictions as a result of the information it had received. Rather than applying for an APC and been subject to scrutiny by the PCNZ, Mr Blue accepted employment in the pharmacy without an APC and in doing so gained unsupervised access to Controlled Drugs.

[38] The Tribunal accepts the submission from the PCC that this context suggests that Mr Blue's conduct may have been deliberate.

[39] Also referred to by the PCC were these matters:

- a) That Mr Blue had received the letter dated 17 May 2016 from the Registrar of the PCNZ advising him he was not entitled to practise in New Zealand without an APC with the explanation that that included practising as a technician.
- b) That Mr Blue was first registered as a pharmacist in June 2010 and ought to have known and been familiar with the requirement to apply for and obtain an APC.

[40] The mitigating factors conceded by the PCC included:

- a) That Mr Blue had expressed some insight into his conduct and remorse.
- b) That Mr Blue had accepted that he had an addiction and acknowledged that the pharmacy profession may conflict with an addiction (referring to a statement that he made to the Police in the course of its investigations as contained in the bundle). There was some evidence that Mr Blue has engaged with a mental health practitioner to address his addiction. (The submissions then continued that Mr Blue had not provided any evidence as to how his acknowledged mental health issues

were being treated or whether his addiction was being managed, and, while that is not a mitigating factor in itself, it is taken into account).

- c) That Mr Blue was studying towards a degree in mechanical engineering.
- d) That Mr Blue had stolen only a small amount of the Rubifen and practised without an APC for only a relatively short period of time.

[41] The PCC submissions referred to Mr Blue's not having practised pharmacy for a number of years and apparently taken genuine steps to pursue an alternative career. Reference was made to Mr Blue's stated intention not to work in the pharmacy sector in the near future. The submission was, however, that, anticipating that that may occur, conditions should be imposed on his practice should he return with detail being given. A fine was submitted to be appropriate and consistent with other cases involving practising without an APC. A fine between \$500.00 and \$1,500.00 was suggested.

[42] In his reply submissions Mr Blue said first that he was unable to continue with some help that he was receiving concerning his health issues but was willing to undergo a review by an independent health practitioner concerning those issues. He disagreed that there was any need to reiterate the personal responsibility of all pharmacists to apply for and obtain an APC, saying it was a "*well-known fact to all [health] practitioners*". Mr Blue said he was unaware when he worked for Forbury Pharmacy that a pharmacist who does not hold an APC cannot work as a technician and that this was "*an oversight due to the numerous emails [he was] receiving at the time*". He referred to this apparently not having been known to the owner of the pharmacy who employed him and allowed him to dispense. Mr Blue retracted a statement he had earlier made and expressly said in his submission that he would not work in the pharmacy sector anymore and would not return to practice at any time and was willing to surrender his registration.

Discussion

[43] This is a serious situation that Mr Blue is in. In his time in Australia missing quantities of Ritalin from his then employer were under investigation causing him to withdraw his registration in Australia. He came to New Zealand and received express advice from the PCNZ concerning his registration and

practising limitations, expressly referring to the need for an APC, even if working under supervision.

[44] Mr Blue did take the work that he was offered at Forbury Pharmacy and he said that it had been his mother who suggested this work for him on a temporary basis. Perhaps there was some failure on the part of the Pharmacy to understand Mr Blue's position or to make clear to him any limitations on what he could or could not do in the context of what he was being employed for. That is not for the Tribunal to rule.

[45] Despite having had the experience that he had had in Australia and the predicament that faced him following his practice there, Mr Blue nevertheless succumbed to the temptation to steal the Rubifen from his employer, the Forbury Pharmacy.

[46] In his statement to the police concerning this, Mr Blue said:

"I took this box of drugs for my own personal use. I am a user of this drug and had actually been really good for the past 6 months. I guess temptation got the better of me.

I know I need help for this addiction and leaving Pharmaceuticals is the best option for me to get myself straight. This is why I am heading towards an Engineering background."

[47] The Tribunal has had to consider this case in the context that first Mr Blue did let his temptation get the better of him and he stole the Rubifen when the opportunity offered. That may indicate ongoing need for medical help for Mr Blue and any addiction he may have.

[48] Secondly the Tribunal must take into account his stated intention first to the police that he was heading towards an engineering background and secondly to the Tribunal that he no longer wished to practise as a pharmacist. That consideration puts the question of whether there is any efficacy in an order for suspension from practice or an order for conditions on continuing in practice. If Mr Blue is not intending to practise, then any suspension would be meaningless as would any ordered conditions.

[49] The Tribunal must assess the position in the context that Mr Blue will likely no longer be practising as a pharmacist at least in the near future. Any order that the Tribunal makes must have a deterrence effect not only for Mr Blue himself but also for all other pharmacists in practice. The message must be sent that a conviction of the kind entered against Mr Blue under the Misuse of Drugs Act,

reflecting adversely on his fitness to practise in the apparent context that Mr Blue may have some addiction to the drug in question, will be treated seriously by the Tribunal.

[50] Likewise, although it was only for a period of 5 days, Mr Blue did practise without a current APC and the Tribunal must again send the clear message to the profession that that is not acceptable. This question has formed the subject of decisions of the Tribunal throughout the health practitioner sector on many occasions. The Tribunal does not accept Mr Blue's submission that there is no need for the message to be sent, because clearly it is not being received and acted upon as was the case here. Mr Blue may have misunderstood the law but that does not alter the fact that it was his obligation to know the law, to understand it correctly, and to comply with it. He did not do so.

[51] All those circumstances combine to require a penalty which has some significance. Because neither suspension or conditions can be considered for the reasons mentioned, the Tribunal is left with the conclusion that the only way to deal with this is to order cancellation of Mr Blue's registration. That will allow him, if he ever wishes to return to practice as a pharmacist, to apply for registration and for that application to be dealt with by the PCNZ according to the then situation. If conditions need to be imposed on any re-registration of Mr Blue, that can be up to the PCNZ. It would be premature for the Tribunal to consider any condition under section 102 of the HPCA Act because the circumstances of Mr Blue's return to the profession, if that is ever to happen, are currently unknown. That would need to be canvassed at the time.

[52] In the case of *Dr Augustine*² the Tribunal considered the same situation in respect to a medical practitioner who had been convicted of offences and had left New Zealand, seemingly permanently to practise elsewhere. In relation to this issue of cancellation as against other orders, the Tribunal said:

“134. In addition to that, given his absence from New Zealand now and his stated intention not to return to practise here, the Tribunal has considered carefully whether its concerns could be addressed by any order short of cancellation of Dr Augustine's registration. If he is not to practise in New Zealand any longer, then a suspension order would be nugatory. Likewise would any conditions on any resumption of practice. Those outcomes are practically not available to the Tribunal. The case compares in that regard with

² 968/Med17/411P.

Fernando where the medical practitioner had been absent from New Zealand for many years and, in considering suspension, the Tribunal said:

‘Before reaching that conclusion, we have of course considered other options such as suspension. In this regard, it should be recalled that the Practitioner has not lived or practised in this country for years. That fact alone suggests that suspension would not be apt’.

135. What the Tribunal can do effectively, however, is cancel his registration so that, if he ever does wish to return to New Zealand and practise, he can make appropriate application and the full situation then, including any dependence his wife may have (or indeed his own medical condition) can be considered.”

- [53] There is an order for cancellation of Mr Blue’s registration made below. It is also appropriate for the Tribunal to order censure of Mr Blue and that is done. It is also appropriate to order a fine to be paid in respect of particular B, Practising without a current Annual Practising Certificate. In line with other cases as to the amount of such fine, a fine of \$500.00 is ordered.

Costs

- [54] The PCC sought an order for contribution by Mr Blue to its costs and provided an estimate of its costs totalling \$21,876.33. Mr Blue questioned the quantum of those estimated costs and an explanation was provided. The Tribunal is satisfied that the amount to be taken into account for PCC costs is reasonable. In addition there are the costs for the Tribunal estimated to total \$17,994.00. That too is a reasonable figure for Tribunal resourcing costs.
- [55] That brings a total cost for bringing and having heard the Charges against Mr Blue just short of \$40,000.00.
- [56] Section 101 of the HPCA Act provides in this context:

“... the Tribunal may—

....

(f) order that the health practitioner pay part or all of the costs and expenses of and incidental to any or all of the following:

(i) ...

(ii) any inquiry made by a professional conduct committee in relation to the subject matter of the charge:

(iii) the prosecution of the charge by ... a professional conduct committee, ...:

(iv) the hearing by the Tribunal”.

- [57] There are two statements of principle relevant from decisions in the High Court. The first of these is *Cooray v Preliminary Proceedings Committee*.³

“It would appear from the cases before the Court that the Council [the MCNZ that then had jurisdiction in the matter] in other decisions made by it has in a general way taken 50% of total reasonable costs as a guide to a reasonable order for costs and has in individual cases where it has considered it is justified gone beyond that figure. In other cases where it has considered that such an order is not justified because of the circumstances of the case, and counsel has referred me to at least two cases where the practitioner pleaded guilty and lesser orders were made, the Council has made a downwards adjustment”.

- [58] The second case is *Vatsyayann v Professional Conduct Committee of the New Zealand Medical Council*.⁴ There it was said:⁵

“So far as costs orders were concerned, the Tribunal correctly addressed a number of authorities and principles. These included that professional groups should not be expected to bear all the costs of a disciplinary regime and that members of the profession who appeared on disciplinary charges should make a proper contribution towards the costs of the inquiry and a hearing; that costs are not punitive; that the practitioner’s means, if known, are to be considered; that a practitioner has a right to defend himself and should not be deterred by the risk of a costs order; and that in a general way 50% of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards...”

- [59] The Tribunal has considered what contribution towards those costs Mr Blue should provide. It has taken into account his means as provided to the Tribunal which essentially referred to the allowances he is receiving as a fulltime student. The Tribunal must, however, also be mindful that these costs will have to be met by other pharmacists to the extent that Mr Blue does not contribute and those pharmacists are discharging their responsibilities as professionals, including having current APCs and paying the cost of those.

- [60] Accordingly the Tribunal has concluded that the appropriate percentage to order Mr Blue to pay is 20%, that is \$8,000.00. (That is a different amount from what was wrongly announced to the hearing, but a correction was made by email exchange shortly after). An order is made below.

³ High Court, Wellington, AP 23/94, 14 September 1995, Doogue J at page 9.

⁴ [2012] NZHC 1138

⁵ Paragraph 34

Non-publication of name

- [61] Mr Blue sought an order for non-publication of his name or identifying details. He referred in the context of the conviction to the “*clean slate*” principle, saying that once the period of 7 years after his conviction was completed, he should be free from publicity concerning that conviction and therefore this decision of the Tribunal.
- [62] In his submissions Mr Blue also said that he had not had time, or legal advice due to his financial situation, to obtain medical information concerning any effect that publication would have on his psychological health. He also referred to his potential for future employment, mental anguish, anxiety and depression and said that he “*would just like the opportunity to move along*”. He said that publication “*could severely impact and impair [his] future career in aiding people with their prosthetic needs.*”
- [63] Mr Blue did not file any affidavit in support of this application and gave no greater explanation as to how that impact on his career could occur. If Mr Blue is pursuing a career in engineering and if this is going to involve assisting in prosthetic processing, then it is appropriate that any future employer has the facility to access detail of the events that have affected Mr Blue in his career as a pharmacist and the outcome of this Charge brought against him as contained in this decision.
- [64] Section 95 of the HPCA Act includes:

“95 Hearings to be public unless Tribunal otherwise orders

(1) Every hearing of the Tribunal must be held in public unless the Tribunal orders otherwise under this section or unless section 97 applies.

(2) If, after having regard to the interests of any person (including, without limitation, the privacy of any complainant) and to the public interest, the Tribunal is satisfied that it is desirable to do so, it may (on application by any of the parties or on its own initiative) make any 1 or more of the following orders:

...
...

(d) an order prohibiting the publication of the name, or any particulars of the affairs, of any person.”

[65] The presumption in section 95(1) of the Act that the Tribunal's hearings shall be in public is the primary principle and endorses the principle of open justice; but section 95(2) does give the Tribunal discretion to grant name suppression.

[66] The test is whether it is "*desirable*" to prohibit the publication of the name or any particulars of the affairs of the person in question and the Tribunal must consider both:

- a) The interest of any person, and
- b) The public interest.

[67] There have been many public interest factors identified by other Tribunal decisions. These include:

- a) Openness and transparency of disciplinary proceedings.
- b) Accountability of the disciplinary process.
- c) Public interest in knowing the identity of a health practitioner charged with a disciplinary offence.
- d) Unfairly impugning other practitioners.

[68] In the preponderance of cases, where a charge of professional misconduct is proved the practitioner will be named. In *T v Director of Proceedings* Panckhurst J said:⁶

"... following an adverse disciplinary finding more weighty factors are necessary before permanent suppression will be desirable. This, I think, follows from the protective nature of the jurisdiction. Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases. Thus, the statutory test of what is "desirable" is necessarily flexible. Prior to the substantive hearing of the charges the balance in terms of what is desirable may incline in favour of the private interests of the practitioner. After the hearing, by which time the evidence is out and findings have been made, what is desirable may well be different, the more so where the professional misconduct has been established".

[69] The provisions of the Criminal Records (Clean Slate) Act 2004 are significantly detailed. Mr Blue would need to take advice on his rights under that Act. In general terms, it refers to criminal convictions and the right for a convicted person not to disclose in certain circumstances. This is quite different from a decision of the Tribunal which makes a finding on a charge laid against a health

⁶ *T v Director of Proceedings* HC Christchurch, CIV-2005-409-2244, 21 February 2006 at [42].

practitioner which refers to a conviction (or any other matter relevant). The Tribunal has its own discretion concerning ordering non-publication of the practitioner's name or identifying details. Those are the considerations that the Tribunal has applied in this case.

[70] The conviction against Mr Blue was entered on 30 January 2017 and no order for suppression of his name was made by the court. Mr Blue's name is therefore in the public domain in this context and will continue to be so at least until 2024, if Mr Blue's submissions are correct. That alone is good reason why the Tribunal should not take into account the "*clean slate*" principle as enunciated by Mr Blue and should decline his application.

[71] The Tribunal has taken all factors into account. These include that there was no suppression of name in the court; the bases on which Mr Blue has applied for this order and the evidence he has supplied to support the application; and the respective interests of the public in knowing the situation against Mr Blue's own interests. It has decided to refuse the application for non-publication. Because Mr Blue may wish to take advice on this question and pursue the matter further, the order for interim name suppression will continue for 20 working days after this decision is communicated to the parties.

Result and orders

[72] The Charge against Mr Blue is found made out in both its particulars.

[73] The registration of Mr Blue as a pharmacist is ordered cancelled.

[74] Mr Blue is censured.

[75] Mr Blue is fined the sum of \$500.00 in respect of Particular B, practising without a current Annual Practising Certificate.

[76] Mr Blue is ordered to pay the sum of \$8,000.00 towards the cost of the prosecution by the PCC and the resourcing of the Tribunal, to be divided equally between them.

[77] Mr Blue's application for non-publication of his name and identifying details is declined; and the interim order for name suppression will expire 20 working days after this decision is communicated to the parties.

[78] Pursuant to section 157 of the HPCA Act the Tribunal directs the Executive Officer:

- a) To publish this decision, and a summary, on the Tribunal's website;

- b) To request the PCNZ to publish either a summary of, or a reference to, the Tribunal's decision in its next available publication to members, in either case including a reference to the Tribunal's website so as to enable interested parties to access the decision.

DATED at Auckland this 28th day of May 2020



.....
David M Carden
Chairperson
Health Practitioners Disciplinary Tribunal

SCHEDULE

CHARGE

Pursuant to section 81(2) of the Act, the Professional Conduct Committee lays a charge that:

- A. On 30 January 2017 Mr Blue, a registered pharmacist, was convicted in the District Court at Christchurch for theft of a Class B controlled drug, namely 30 Rubifen 10mg tablets, which is an offence under section 11 of the Misuse of Drugs Act 1975 and punishable by imprisonment for a term of three months or longer.

This conviction reflects adversely on Mr Blue's fitness to practise as a pharmacist. This is a ground on which a health practitioner may be disciplined under section 100(1)(c) of the Act.

AND/OR

- B. Between 3 October 2016 and 7 October 2016, Mr Blue, a registered pharmacist, practised the profession of pharmacy when he did not hold a current practising certificate.

This is a ground on which a health practitioner may be disciplined under section 100(1)(d) of the Act.